

RE APPLICATION BY THE UNION OMNIBUS CO. SDN. BHD.;**THE UNION OMNIBUS CO. SDN. BHD. v. KESATUAN PEKERJA-PEKERJA PENGANGKUTAN**

[O.C.J. (Ajaib Singh J.) March 4, 1977]

[Seremban — Originating Motion No. 113 of 1976]

Administrative Law — Certiorari — Industrial Court Award — Application for leave to apply for an order of certiorari.

This was an application for leave to apply for an order of *certiorari* to quash an award by the Industrial Court and for a stay of the implementation of the award. The application was supported by the affidavit of the applicants' manager and by a statement. It was alleged in the affidavit and the statement that the Industrial Court had acted arbitrarily and without jurisdiction or alternatively that it had acted in excess of its jurisdiction and had committed errors of law apparent on the face of the record. It was also alleged that the Industrial Court had acted in breach or violation of the rules of natural justice in refusing, neglecting or omitting or failing to allow the applicants their fundamental right to a reasonable opportunity to present their case and that the findings upon which the award was based were biased, perverse or unsupported by evidence or were errors of law. The Industrial Court heard the case for several days between October 2, 1975 and August 17, 1976 when it announced that it would make an award. The applicants alleged that at that stage the Industrial Court had not yet heard the applicants' case.

Held: (1) an order of *certiorari* is normally issued where on the face of the record there has been an excess or want of jurisdiction or where there has been a breach of natural justice or if it appears that there has been an error of law on the face of the record. Under section 32(3)(a) of the Industrial Relations Act 1967 an award of the Industrial Court is final and conclusive and no award is to be challenged, appealed against, reviewed, quashed or called in question in any court. Such a restriction however does not preclude the High Court from issuing an order of *certiorari*;

(2) in this case the applicants had failed to produce sufficient *prima facie* evidence on which the court ought to make the order as prayed.

Cases referred to:-

- (1) *Mak Sik Kwong v. Minister of Home Affairs, Malaysia* [1975] 2 M.L.J. 168.
- (2) *Non-Metallic Mineral Products Manufacturing Employees Union & Ors. v. South East Asia Fire Bricks Sdn. Bhd.* [1976] 2 M.L.J. 67.

ORIGINATING MOTION.

Andrew Tsan Chuan Saw for the applicants.

Ajaib Singh J.: This was an application for leave to apply for an order of *certiorari* to quash an award by the Industrial Court and for a stay of the implementation of the award. The application was supported by the affidavit of the applicants' manager and by a statement. It was alleged in the affidavit and the statement that the Industrial Court had acted arbitrarily and without jurisdiction or alternatively that it had acted in excess of its jurisdiction and had committed errors of law apparent on the face of the record. It was also alleged that the Industrial Court had acted in breach or violation of the rules of natural justice in refusing, neglecting or omitting or failing to allow the applicants their fundamental right to a reasonable opportunity to present their case and the merits thereof. It was further alleged that the findings upon which the award was based were biased, perverse or unsupported by evidence or were errors of

law. The Industrial Court heard the case for several days between October 2, 1975 and August 17, 1976 when it announced that it would make an award. The applicants alleged that at that stage the Industrial Court had not yet heard the applicants' case.

Having perused the application and the various documents which were exhibited I came to the conclusion that the applicants had failed to produce sufficient *prima facie* evidence on which I ought to make any order as prayed. Serious allegations were made by the applicants against the Industrial Court but all those allegations appeared to me to be groundless and unsupported by the true facts in the proceedings before the Industrial Court. The Transport Workers Union's statement of its case as well as the applicants' statement in reply which were before the Industrial Court and the notes of evidence taken by the Industrial Court showed that the parties had made various representations to the court and had also indicated that there was a possibility of a settlement on the issues especially on the wage-structure. However no agreement was reached. The applicants contended that they could not meet a wage-structure other than their own because of their financial position as shown in their profit and loss accounts for 1975. The Industrial Court therefore called for statements of accounts of the applicants from 1968 to 1975 as compared with their position 10 years previously in 1958. All these records were produced and perused by the Industrial Court and it expressed the view that they were very unsatisfactory because of certain observations expressed by the auditors. In the event the Industrial Court made its award which is now the subject-matter of this application.

An order of *certiorari* is normally issued where on the face of the record there has been an excess or want of jurisdiction or where there has been a breach of natural justice or if it appears that there has been an error of law on the face of the record. Under section 32(3)(a) of the Industrial Relations Act, 1967 an award of the Industrial Court is final and conclusive and no award is to be challenged, appealed against, reviewed, quashed or called in question in any court. Such a restriction however does not preclude the High Court from issuing an order of *certiorari*. There are many decided cases in support of this proposition but I think I need only cite the case of *Mak Sik Kwong v. Minister of Home Affairs, Malaysia*⁽¹⁾ where Abdoalcader J. after reviewing a number of those cases said —

"I do not think that there can be any doubt now that it is settled law that a finality or privative clause does not restrict in any way whatsoever the power of the courts to issue *certiorari* to quash for jurisdictional defect, error of law on the face of the record or manifest fraud. The same process of reasoning has even permitted the courts to interpret ouster clauses expressly referring to prohibition and *certiorari* and taking away the right to apply for such remedies as still permitting the grant of those remedies for lack of jurisdiction or fraud but the lack of jurisdiction or the fraud must be manifest."

The true role of *certiorari* in relation to industrial disputes was neatly stated by Raja Azlan Shah F.J. in the case of *Non-Metallic Mineral Products Manufacturing Employees Union & Ors. v. South East Asia Fire Bricks Sdn. Bhd.*⁽²⁾ as follows —

"... Proceedings by way of *certiorari* with regard to industrial disputes are not as of right otherwise they may materially affect the fundamental basis of the decision of the Industrial Court under the Industrial Relations Act, 1967, namely, quicker solution to industrial dispute to achieve industrial peace. The Act is intended to be a self-contained one. It seeks to achieve social justice on the basis of collective bargaining, conciliation and arbitration. Awards are given in circumstances peculiar to each dispute and the Industrial Court is to a large extent free from the restrictions and technical considerations imposed on ordinary courts. The jurisdiction of the High Court to issue orders of *certiorari* is neither an appellate nor a revisional jurisdiction. Also from the very nature of the power conferred under section 25 of the Courts of Judicature Act, 1964, it is clear that in exercise of this power the High Court exercised original jurisdiction. This jurisdiction stems from the prerogative jurisdiction inherited from the United Kingdom courts and its object is mainly to enable the superior courts to keep inferior tribunals within the bounds of their authority. The supervisory character is essential for always in the background there is the beguiling illusion that an inferior tribunal entrusted to hand down awards of a final nature may hand down awards as it likes. Therefore the jurisdiction may for convenience be described as an extraordinary original jurisdiction. The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. For instance, it has no jurisdiction under section 25 of the Courts of Judicature Act to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face of the record. It cannot arrogate the powers of a Court of Appeal by substituting its own judgment for that of the Industrial Court on questions of fact and cannot review the evidence."

The present proceedings before me were preliminary to the actual hearing on the order of *certiorari* to quash the award of the Industrial Court. Still it was incumbent upon the applicants to show a *prima facie* case in support of their application for leave to apply for an order of *certiorari*. It is not true to say that the Industrial Court refused to hear the applicants' case. Both parties were represented before the Industrial Court and they had filed written statements together with various documentary exhibits. The notes of evidence showed that at the continued hearing on August 17, 1976 the court found no purpose in continuing to hear more witnesses if, as the court found on the representations made by the parties, it was the applicants' contention that the best the applicants could offer the drivers and conductors was a wage-structure consisting of a basic pay plus commission by percentage totalling not less than the wages received at the present rate if not more as calculated and shown in a document which was exhibited. The applicants' representative before the Industrial Court contended that they could not meet any other wage-structure because of the applicants' financial position as shown in the profit and loss accounts for 1975. The Industrial Court therefore required the applicants to produce all statements of accounts from 1968 to 1975 as compared with their position 10 years previously in 1958 all of which were subsequently produced for examination by the Industrial Court. The Industrial Court also obtained other documents relevant to the applicants' case such as summaries of monthly bus revenue, list of taxis, lorries, office car and jeep, recurrent expenses for buses from 1968 to 1974 and diesel prices from 1972 to 1976. Summaries of monthly collections on routine buses were also obtained for 1974 and 1975 before and after the increase of fares in April 1974 and the list of 8 new

A buses bought after 1970 and the list of 5 working directors. On the face of the record therefore it was quite clear that the Industrial Court had given every opportunity to the applicants to present their case and when it found that there was no purpose in prolonging this case any further as it had all the evidence required for the purpose of making its award it made its position clear on April 17, 1976 that it would make its award in due course on the evidence it had heard.

B The Industrial Court had in no way acted arbitrarily or without jurisdiction or in excess of jurisdiction and there certainly was no error of law on the face of the record. There was also nothing to support the allegation that there had been a breach of the rules of natural justice. The Industrial Court had heard both parties and in making its award the court had considered the written case put up by the Transport Workers' Union, the written reply thereto by the applicants and all the other evidence recorded at the hearing including the documentary exhibits tendered. The applicants had altogether failed to substantiate any of their allegations against the Industrial Court in seeking leave to apply for an order of *certiorari* and I therefore dismissed their application.

Application dismissed.

Solicitors: Mustapha, T.C. Saw & Co.

PUBLIC PROSECUTOR v. PHUNG CHIN HOCK

[O.Cr.J. (Abdul Hamid J.) May 17, 1977]

[Kuala Lumpur — Federal Territory Criminal Trial
No. 39 of 1976]

Criminal Law and Procedure — Charge of possession of ammunition — Whether Internal Security Act, 1960 is still in force — Whether proclamation of emergency on 15th May 1969 still in force — Internal Security Act, 1960, s. 57 — Constitution (Amendment) Act, 1960.

G *Constitutional Law — Amendment to Constitution — Whether amendment to constitution made by Constitution (Amendment) Act, 1960, valid — Whether contrary to Constitution — Federal Constitution, Art. 159.*

H In this case the accused was charged with the offence of unlawful possession of ammunition, an offence under the Internal Security Act, 1960. It was argued as a preliminary point that the amendments made to Articles 149 and 150 of the Federal Constitution by the Constitution (Amendment) Act, 1960 were invalid as being contrary to the Constitution and therefore as a result the Internal Security Act, 1960 and the Proclamation of Emergency on 15th May 1969 have both lapsed.

I **Held:** (1) Article 159 of the Federal Constitution clearly allows the Constitution to be amended by Federal law. The Constitution (Amendment) Act, 1960 was passed pursuant to and in accordance with the provisions of the Constitution and is therefore valid;

(2) on the facts it had been proved beyond reasonable doubt that the accused had possession of the ammunition and no doubts had been cast as to the prosecution case by the defence story.

Case referred to:-

(1) *Johnson Tan Han Seng v. Public Prosecutor & Ors.* cases [1977] 2 M.L.J. 66.